IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

TIMMY HEAD and
AVA JANE BOOHER HEAD,

Debtors.

No. 99-20249
Chapter 7

TIMMY HEAD and
AVA JEAN HEAD,

Plaintiffs,

vs.

HOUSEHOLD FINANCIAL
CENTER, INC.,

Defendant.

Adv. Pro. No. 99-2019

M E M O R A N D U M

APPEARANCES:

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

In this adversary proceeding, the chapter 7 debtors seek the avoidance pursuant to 11 U.S.C. § 506(d) of the second mortgage on their home, which lien if valued under 11 U.S.C. § 506(a) would be wholly unsecured. The mortgage holder has moved for judgment on the pleadings, asserting that the U.S. Supreme Court decision in *Dewsnup v. Timm*, 502 U.S. 410, 112 S. Ct. 773 (1992), bars the avoidance of its lien. As discussed below, this court agrees, concluding that *Dewsnup* proscribes not only the "strip down" of undersecured claims, but also the "stripping off"[*] of wholly unsecured liens. Accordingly, the motion for judgment on the pleadings will be granted and this action dismissed. This is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(k).

I.

As set forth in the complaint, Ava Jane Booher purchased certain real property from the U.S. Department of Agriculture's Farmers Home Administration ("FHA") for a purchase price of

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[*]It has been noted that "'[s]tripping off' a lien occurs when the entire lien is avoided, whereas 'stripping down' occurs when an undersecured lien is bifurcated and the unsecured portion is avoided." *Yi v. CitiBank (Maryland) N.A. (In re Yi)*, 219 B.R. 394, 397 n.6 (E.D. Va. 1998)(citing *Lam v. Investors Thrift (In re Lam*), 211 B.R. 36, 37 n.2 (B.A.P. 9th Cir. 1997)).

$40,000.00 on June 29, 1990. In connection with this purchase, Ms. Booher executed a deed of trust, granting FHA a lien on the real property in the amount of the purchase price. Ms. Booher married Timmy Head on September 30, 1995, and subsequently on October 22, 1997, the couple borrowed $22,800.00 from Household Financial Center, Inc. ("Household"). To secure payment of this obligation, Mr. and Mrs. Head granted Household a lien on the same real property which had been purchased from FHA.

On February 1, 1999, Mr. and Mrs. Head filed a voluntary petition under chapter 7 commencing the underlying bankruptcy case. Listed in their Schedule A-Real Property was a house and lot at 1671 Mill Creek Road having a current market value of $46,700.00, against which there was a secured claim in the amount of $52,954.76. The only creditor listed in their Schedule D-Creditors Holding Secured Claims was USDA-Rural Housing with a claim in the amount of $52,954.76, secured by a first mortgage on the debtors' house and lot. Household was scheduled by the debtors in Schedule F-Creditors Holding Unsecured Nonpriority Claims as holding a disputed claim in the amount of $23,270.63. On March 29, 1999, the chapter 7 trustee in the case filed a "REPORT OF NO DISTRIBUTION AND ABANDONMENT OF PROPERTY" wherein she indicated that there was no property available for distribution from the estate over and above the debtors' exemptions and liens, abandoned all property of the estate, and certified that the estate had been fully administered.

On April 1, 1999, the debtors initiated the instant adversary proceeding seeking to have the lien granted to Household declared void under 11 U.S.C. § 506(d). The stated basis for the requested relief is that both as of the date the mortgage was conveyed to Household and as of the date of the filing of the bankruptcy petition, there was no equity in the real property to which the Household deed of trust could attach because the balance on the first mortgage debt to FHA exceeded the value of the collateral. The debtors maintain that as a result of this valuation, Household's claim is wholly unsecured and its lien may therefore be avoided under § 506(d) of the Bankruptcy Code. *See* 11 U.S.C. § 506(d)("To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void ....").

In its answer to the complaint, Household denies that its claim is wholly unsecured and prays that the complaint against it be dismissed. It asserts that at the time it obtained the lien on the debtors' real property, the debtors informed Household that the purchase price of the home had been $45,000.00, that the value of the home was currently $65,000.00, and that the amount owed on the first mortgage was $37,200.00. Notwithstanding the factual dispute as to the value of the debtors’ real property, Household filed a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), as incorporated by Fed. R. Bankr. P. 7012(b), on May 10, 1999, asserting that even if the value of the real property has never been greater than $40,000.00, the complaint fails to state a claim for relief. Household argues that under the Supreme Court’s decision in *Dewsnup*, its lien may not be avoided regardless of the lack of equity in the home to secure the lien. Household has filed a proof of claim in the debtors’ bankruptcy case in the amount of $23,016.31 and USDA Rural Housing Service has filed a claim for $52,238.34.

II.

Section 506 of the Bankruptcy Code provides in pertinent part the following:

> (a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor’s interest in the estate’s interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor’s interest or the amount so subject to setoff is less than the amount of such allowed claim....

...

> (d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void unless—
>
> (1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or
>
> (2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

Under subsection (a) of § 506, an allowed claim is "secured only to the extent of the value of the property on which the lien is fixed; the remainder of that claim is considered unsecured." *U.S. Ron Pair Enter., Inc.*, 489 U.S. 235, 238, 109 S. Ct. 1026, 1029 (1989). "Thus, a $100,000 claim, secured by a lien on property of a value of $60,000, is considered to be a secured claim to the extent of $60,000, and to be an unsecured claim for $40,000." *Id.* at 240 n.3, 109 S. Ct. at 1029. Subject to certain exceptions, subsection (d) of § 506 indicates that a lien securing a claim against the debtor is void to the extent it is not an allowed secured claim. *In re Young*, 199 B.R. 643, 650 (Bankr. E.D. Tenn. 1996).

Prior to the Supreme Court's decision in *Dewsnup*, many courts had read subsections (a) and (b) of § 506(d) as being complementary, concluding that to the extent a claim was undersecured by reason of the § 506(a) valuation, § 506(d) permitted the avoidance or "stripping down" of the lien to the value of collateral. *See* 4 Collier on Bankruptcy ¶ 506.06[1] (15th ed. rev. 1999) and cases cited at n.6. In *Dewsnup*, the debtors sought to redeem their farmland from the lien of the mortgage holder pursuant to § 506(a) and (d) of the Bankruptcy Code by paying the property's fair market value. At the time of the bankruptcy filing, the farmland had a value of $39,000.00 and the mortgage holder was owed approximately $120,000.00. *Dewsnup*, 502 U.S. at 413, 112 S. Ct. at 776. When the dispute reached the Supreme Court, it framed the issue as follows: "May a debtor 'strip down' a creditor's lien on real property to the value of the collateral, as judicially determined, when that value is less than the amount of the claim secured by the lien?" *Id.* at 410, 112 S. Ct. at 775. The high court answered the question in the negative.

The Supreme Court rejected the proposition that "allowed secured claim" as used in § 506(d) was to be defined by reference to § 506(a), noting that § 506(a) was not a definitional provision by its terms. *Id.* at 415, 112 S. Ct. at 777. Adopting the argument of the mortgage holder, the court stated that:

> [T]he words [allowed secured claim] should be read term-by-term to refer to any claim that is, first, allowed, and second, secured. Because there is no question that the claim at issue here has been "allowed" pursuant to § 502 of the Code and is secured

> by a lien with recourse to the underlying collateral, it does not come within the scope of § 506(d) which voids only liens corresponding to claims that have *not* been allowed and secured. This reading of § 506(d) ... gives the provision the simple and sensible function of voiding a lien whenever a claim secured by the lien itself has not been allowed.

Id. at 415, 112 S. Ct. at 777.

Concluding that § 506 embraced some ambiguities, the Supreme Court refused to depart from the traditional pre-Code rule in liquidation cases that liens pass through bankruptcy unaffected, absent some indication in the Bankruptcy Code’s legislative history that this was Congress’ intent. *Id*. at 418, 112 S. Ct. at 779. Because the mortgagor and the mortgagee had bargained for the lien to stay with the real property until foreclosure, the Supreme Court reasoned that any increase in value of the real property should accrue to the benefit of the creditor rather than the debtor. *Id.* at 417, 112 S. Ct. at 778.

Since *Dewsnup*, the vast majority of the courts and the commentators have interpreted *Dewsnup* as a prohibition on lien stripping in chapter 7 cases under § 506(d) absent disallowance of the underlying claim. *See, e.g., Liberty Nat’l Bank and Trust Co. of Louisville v. Burba (In re Burba)*, 1994 WL 709314 at *4 (6th Cir. Nov. 10, 1994)(“The Supreme Court held that § 506(d) does not authorize lien stripping in chapter 7 cases ....”); William E. Callahan, Jr., Note, *Dewsnup v. Timm and*

Nobelman v. American Savings Bank: The Strip Down of Liens in Chapter 12 and 13 Bankruptcies, 50 WASH. & LEE L. REV. 405 (Winter 1993)("[T]he Court held that a debtor in a Chapter 7 bankruptcy could not strip down a creditor's lien on real property to the value of the property securing the lien under section 506(d) ...."); and 4 COLLIER ON BANKRUPTCY ¶ 506.06[1][b] (15th ed. rev. 1999)("Following *Dewsnup*, courts have declined to recognize lien stripping in the chapter 7 context."). On the other hand, the post-*Dewsnup* courts have almost universally concluded that *Dewsnup* has no application to reorganization cases. *See, e.g., In re Burba*, 1994 WL 1388 at *6 ("After the Supreme Court decision in *Dewsnup*, most courts agree that *Dewsnup* ... does not prevent a strip down of a secured creditor's lien in Chapter 13 because different rules apply in Chapter 13 cases."); and 4 COLLIER ON BANKRUPTCY ¶ 506.06[1][c] (15th ed. rev. 1999). Lien stripping in chapter 13 by means of a "cramdown" is explicitly authorized by § 1325(a)(5): the legislative history to § 1325(a)(5) unequivocally indicates that this was Congress' intent and the Supreme Court expressly limited its decision in *Dewsnup* to liquidation proceedings, noting that the treatment of liens in reorganization cases had differed historically from those in liquidation proceedings. *See In re Young,* 199 B.R. at

650-651 (quoting *Dewsnup*, 502 U.S. at 417, 112 S. Ct. at 778 n.3 ("[W]e express no opinion as to whether the words 'allowed secured claim' have different meaning in other provisions of the Bankruptcy Code.") and 502 U.S. at 418, 112 S. Ct. at 779 ("Apart from reorganization proceedings, ... no provision of the pre-Code statute permitted involuntary reduction of the amount of a creditor's lien for any reason other than payment on the debt.")).

In the present adversary proceeding, the debtors seek to narrowly limit the holding of *Dewsnup* to the facts which were before the court: a creditor who is only partially secured under the § 506(a) calculation, *i.e.,* an undersecured creditor. They argue that *Dewsnup* is inapplicable to a lien creditor who is wholly unsecured under § 506(a), that such a creditor by definition cannot have an "allowed secured claim," and therefore its lien is void under § 506(d). In fact, two courts have reached this very conclusion. *See Yi v. CitiBank (Maryland) N.A. (In re Yi)*, 219 B.R. 394 (E.D. Va. 1998) and *Howard v. Nat'l Westminster Bank, U.S.A. (In re Howard)*, 184 B.R. 644 (Bankr. E.D. N.Y. 1995)(lien may be avoided under § 506(d) because entirely unsecured and nonconsenual).

In response, Household asserts that *Dewsnup* stands for the proposition that a § 506(a) valuation provides no basis for stripping a lien under § 506(d). According to Household, "[a]fter *Dewsnup*, section 506(d) allows a debtor to avoid a lien only if the underlying claim is disallowed, and not if a portion of the claim is deemed unsecured by operation of section 506(a)." Brief in support of defendant's motion for judgment on the pleadings at p.4. Because the debtors have not objected to Household's claim, Household maintains it has an allowed secured claim within the meaning of § 506(d) as defined by the Supreme Court in *Dewsnup* irrespective of the § 506(a) valuation. Household's position is also supported by case authority. *See Laskin v. First Nat'l Bank of Keystone (In re Laskin)*, 222 B.R. 872 (B.A.P. 9th Cir. 1998); *Walkup v. First Interstate (In re Walkup)*, 183 B.R. 884 (Bankr. E.D. Cal. 1995); and *In re Mershman*, 158 B.R. 698 (Bankr. N.D. Ohio 1993).

In this court's view, Household is clearly correct. The Supreme Court's determination in *Dewsnup* that the creditor had an allowed secured claim did not turn on the existence of equity to support the lien under § 506(a). In fact, the court expressly rejected the argument that allowed secured claim has the same meaning in § 506(d) as it does in § 506(a), noting that the phrase as used in § 506(d) "need not be read as an indivisible term of art defined by reference to 506(a)." *Dewsnup*, 502 U.S. at 415, 112 S. Ct. at 777. Instead, the court concluded that "'secured claim' (for purposes of § 506(d) alone) simply connotes an allowed claim that is 'secured' in the ordinary sense, *i.e.*, that is backed up by a security interest in property, whether or not the value of the property suffices to cover the claim." *Id*. at 423, 112 S. Ct. at 781 (Scalia, J., dissenting). Thus, because a claim's secured status for purposes of § 506(d) is not dependent on its valuation under § 506(a), whether a creditor is partially secured or wholly unsecured within the meaning of § 506(a) is totally irrelevant as far as § 506(d) is concerned. *Id*. at 417, 112 S. Ct. at 778 ("The voidness language [of § 506(d)] sensibly applies only to the security aspect of the lien and then only to the real deficiency in the security."). *See also* 4 COLLIER ON BANKRUPTCY ¶ 506.06[1][a] (15th ed. rev. 1999)("[T]he Court [in *Dewsnup*] determined that section 506(d) does not void liens on the basis of whether they are secured under section 506(a), but on the basis of whether the underlying claim is allowed or disallowed under section 502.").

The cases which support the debtors' assertion that Household's lien may be avoided because it is wholly unsecured within the meaning of § 506(a), *In re Yi* and *In re Howard*, simply ignored *Dewsnup*'s directive that secured status for § 506(d) purposes is not to be determined by reference to §

506(a). The court in *In re Yi* relied on various chapter 13 decisions which had utilized the § 506(a) valuation in the chapter 13 confirmation process to "cramdown" liens, without recognizing the distinction between liquidation and reorganization proceedings. *In re Yi*, 219 B.R. at 397-398. Furthermore, as noted by the bankruptcy appellate panel in *Laskin*, neither the *Yi* nor the *Howard* courts propounded any rationale for distinguishing between wholly unsecured or undersecured liens as far as the Supreme Court's justification for the *Dewsnup* decision was concerned. *In re Laskin*, 222 B.R. at 876.

> "[W]hether the lien is wholly unsecured or merely undersecured, the reasons articulated by the Supreme Court for its holding in *Dewsnup* ... that liens pass through bankruptcy unaffected, that mortgagee and mortgagor bargained for a consensual lien which would stay with real property until foreclosure, and that any increase in value of the real property should accrue to the benefit of the creditor, not the debtor or other unsecured creditors—are equally pertinent.

Id.

III.

In summary, the debtors in this chapter 7 case may not utilize § 506(d) of the Bankruptcy Code to avoid or "strip off" Household's lien regardless of whether Household's claim is wholly unsecured or merely undersecured within the meaning of §

506(a). An order will be entered in accordance with this memorandum opinion granting Household's motion for judgment on the pleadings and dismissing this adversary proceeding.

FILED: May 14, 1999

BY THE COURT

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE